



2018 REPORT ON INDIGENCY STANDARDS

MARCH 15, 2018

Session Law 2017-57, Section 18A.3

The Administrative Office of the Courts, in conjunction with Indigent Defense Services, shall study and develop specific statewide standards for determining indigency for defendants. The study shall include a review of the practices of other states regarding determination of indigency, analysis of the cost-effectiveness of alternatives to the status quo, and implementation plans for the standards agreed upon. The standards may take local expenses and cost-of-living into account. The implementation plans should include procedures for auditing future indigency determinations to ensure that the new standards are working as intended. The Administrative Office of the Courts and Indigent Defense Services shall issue a report to the chairs of the Joint Legislative Oversight Committee on Justice and Public Safety by February 1, 2018.



CURRENT PRACTICE IN NORTH CAROLINA



CASE LAW AND STATUTES

- Gideon v Wainwright – In 1963, the U.S. Supreme Court held that any person who is “too poor to hire a lawyer” must be provided counsel to defend criminal charges, but the Court did not define “too poor to hire a lawyer.”
- N.C.G.S. 7A-450 (a) - An indigent person is “financially unable to secure legal representation and to provide all other necessary expenses of representation in an action or proceeding.”
- N.C.G.S. 7A-450 (c) - “The question of indigency may be determined or redetermined by the court at any stage of the action or proceeding at which an indigent is entitled to representation.”



STATUTES CONTINUED

- N.C.G.S. 7A-450 (d) - If the indigent defendant “becomes financially able to secure legal representation and provide other necessary expenses of representation, he must inform the counsel appointed by the court to represent him of that fact.”
- N.C.G.S. 7A-451 outlines 18 actions and proceedings when counsel may be appointed



DOCUMENTING EXISTING METHODS

- Approximately 25% of the total combined number of district court and superior court judges responded to an online survey
- Fifty-nine district court judges representing at least 29 judicial districts, and 37 superior court judges representing at least 23 judicial districts and all 8 divisions
- A focus group was also held.

Six Most Common Factors Typically Considered for Indigency Determination in N.C.

Type	Percentage of Respondents
<i>Affidavit of Indigency</i>	100%
Type of case (misdemeanor, felony, etc.)	77.1%
Receipt of need-based government benefits	60.0%
Personal knowledge of attorney fees	53%
Personal knowledge of defendant	24%
County living wage or self-sufficiency wage	11.5%



ONE JUDGE COMMENTED THAT THE AFFIDAVIT
“... IS FILLED OUT BY PERSONS WHO FOR THE
MOST PART CAN BARELY READ AND WRITE,”
AND “WHEN I TELL THE PERSON THEY HAVE
NOT FILLED THE APPLICATION OUT
CORRECTLY THE SECOND TRY IS NO BETTER.”



AFFIDAVIT OF INDIGENCY – COURT’S PERSPECTIVE

- In most judicial districts, a defendant designates intent to seek appointed counsel by completing AOC-CR-226 (*Affidavit of Indigency*).
- Local jurisdictions are not required to use this form and the form is not required for appointment of counsel.
 - It may impractical to complete depending on the defendant’s mental or cognitive ability.
- The form can give the judge information about a defendant’s wages, assets, expenses, debts, etc. which provides a foundation for questioning the defendant.



AFFIDAVIT OF INDIGENCY – DEFENDANT’S PERSPECTIVE

- Primarily passed out to defendants who complete while waiting in court
- Instructions provided to defendants vary by courtroom. One district described how a deputy clerk, a provisional attorney, or a probation officer might assist the defendant with the form, but this is not a statewide practice.
- The person applying for counsel must sign and swear/affirm that the information is “true and correct.”
- Signing the affidavit authorizes the court to contact “creditors, employers, or family members, any governmental agencies . . .” regarding eligibility.



AFFIDAVIT OF INDIGENCY – DEFENDANT’S PERSPECTIVE

AOC-CR-226 has three notices to defendants:

- Speak with your attorney about the case – not the interviewer.
- “A court-appointed attorney is not free. If you are convicted or plead guilty or no contest, you may be required to repay the cost of your lawyer as a part of your sentence. The Court may also enter a civil judgment against you.”
 - A North Carolina Tax Refund may be used to pay costs
- It provides information about N.C.G.S. 7A-456(a) stating that “a false material statement made by a person under oath or affirmation in regard to the question of his indigency constitutes a Class I felony.”



REVIEWING THE PRACTICES OF OTHERS



NCAOC AND IDS STAFF REVIEWED

- The report of the Criminal Investigation and Adjudication Committee of the North Carolina Commission on the Administration of Law and Justice which included implementation of uniform indigency standards among its recommendations to improve the indigent defense system in the state. The report cited the work of the Brennan Center for Justice but did not identify specific standards.
- Previous studies of the topic as well as information from the National Center for State Courts and other national associations
- State statutes, case law, and lists developed by other groups to create an inventory of factors that are used across the United States



FACTORS FROM OTHER STATES

- Forty-seven states have identified at least one specific factor
- At least one-third of states use these six factors when making an indigency determination
- Wide variability in how states use individual factors

Common Categories of Factors From Other States

Income of person requesting counsel

Assets of person requesting counsel

Federal poverty guidelines

Costs associated with securing an attorney

Debts of person requesting counsel

Receipt of need-based government benefits



COST-EFFECTIVENESS OF ALTERNATIVES NOT RECOMMENDED FOR IMPLEMENTATION



ALTERNATIVE #1: SCREENING AND VERIFYING

Lancaster County, Nebraska

- A study of their indigency screening project found 0.2% of defendants provided false information that could have led to appointed counsel
- Pilot found “increased efficiency in indigency appointments,” collecting information outside of the hearing reduced “in-court time for judges, attorneys, and defendants,” and the private setting “seemed comforting to defendants.”
- There was “no indication that the program was impacting (reducing) the number of defendants receiving court-appointed attorneys, and there was no indication of a cost savings from verification.” The screening project was cut from the county’s budget in 2005, and the money was reinvested in the Public Defender’s office to fund an additional attorney.



ALTERNATIVE #1: SCREENING AND VERIFYING

Massachusetts Probation Service

- This is an ongoing screening process and they have determined that an average of 14 minutes per defendant screening and verification is used to query three state created and administered databases
- Determined 1.15% of defendants “misrepresented their incomes.”
- Concluded that there is “very little opportunity for the Commonwealth to save or recoup any significant costs through indigency verification,” and the Commonwealth “would need to reduce the scope of indigency verification procedures, not seek to identify fraudulent indigency claims” to reduce overall costs.



N.C.'s History with Pre-Screening for Eligibility

Indigency screener positions were created in eight counties with the primary responsibility of obtaining pre-determined data elements, complete the affidavit of indigency, and verify data.

- First piloted in 1985 and funding eliminated in 1995
- Comparing assigned counsel costs to the cost of screener positions showed only one county with sufficient savings to justify costs of screening
- Anecdotal reports: reduced “no shows” and wait times for assigned counsel, judges were better informed about defendants with obvious mental disorders, and expedient appointment of the same lawyer.

Locations of Indigency Screeners –1987



Implications of Renewing Screening in NC

- How many people would be screened?
- Who could screen?
- What are the job duties and how would they be carried out?

Estimated Indigency Screener Need		
Location	Estimated Number of Indigency Screeners Needed (at 9% above FY 2015-2016 IDS cases)	Estimated Number of Indigency Screeners Needed (at 50% above FY 2015-2016 IDS cases)
Statewide FTE	52.50 FTE	97.00 FTE
Statewide FY 2017-18 Cost of FTE	\$3,324,142.50	\$6,141,749.00



If NC Indigency Screeners Identified Misrepresented Information at a Massachusetts Rate

Potential Costs Offset by Discovery of Misrepresented Information		
Location	Estimated Cost Decreased with 1.15% cases (at 9% above FY 2015-16 cases)	Equivalent Number of Indigency Screeners That Defrayed Counsel Costs Might Support (at 9% above FY 2015-16 cases)
Statewide	\$1,152,647.71	18.20 FTE

- The anticipated reduction in cases would not offset costs of an indigency screener’s work. The defrayed costs might fund approximately 18.20 FTE, while the overall estimated statewide need is at least 52.50 FTE.
- Given North Carolina’s existing recoupment efforts related to costs of court-appointed counsel, which are paid to the General Fund, the misrepresentation rate may actually need to be higher than 1.15% to realize the estimated cost decreases in the table.



ALTERNATIVE #2: THIRD-PARTY VERIFICATION

- Equifax Inc. example
 - Real-time and employment history search options
 - Searchable by social security number
 - Estimated cost \$9.00 - \$16.00 depends on volume

Cost Estimates for Vendor-Based Employment Verification (assuming lowest \$9 rate)			
Location	Verification Cost at \$9.00 Per Request (at 9% above FY 2015-2016 cases)	IDS Costs Minus Recoupment in FY 2015-2016	Estimated Percentage of Cases That Would Need to be Screened Out to Offset Vendor Costs
Statewide	\$2,889,524.18	\$100,230,235.23	2.88%
Note: Additional staff time would be required to process verification queries			



ALTERNATIVE #3: RETROSPECTIVE AUDIT

- NCAOC Internal Audit Division (IAD) currently examines the frequency that paper files contain fee applications and orders of assigned counsel.
- One full-time internal auditor reviewing a case for 60 minutes could review more than 2,000 cases each year at an estimated recurring cost of \$117,073 in FY 2018-19.
- If an auditor required the use of a third-party verification service then the additional cost would be estimated at \$16.00 per defendant search.
- Other considerations include potential limitations of verifying information after disposition and the extent to which an audit sample size could impact the work of clerks of superior court.



THREE-PART IMPLEMENTATION PLAN IN PROGRESS WITH AN ANTICIPATED JANUARY 1, 2109 STATEWIDE ROLLOUT



REVISE THE AFFIDAVIT OF INDIGENCY

- In order to develop consistent statewide standards, one *Affidavit of Indigency* form should be used in all jurisdictions.
- The current *Affidavit of Indigency* (AOC-CR-226) is viewed as too complex for the education level of many defendants. This may have contributed to local variations of the form and the accuracy of the information provided by defendants.
- IDS is revising the *Affidavit of Indigency*, using feedback from local courts, to ensure it adequately captures information in a way that meets the needs of jurisdictions, in a format that is understandable for defendants.

(TYPE OR PRINT IN BLACK INK) In The General Court Of Justice
☐ District ☐ Superior Court Division

STATE OF NORTH CAROLINA
County

File No.
Additional File No.

AFFIDAVIT OF INDIGENCY
G.S. 7A-450 et seq.

Name Of Applicant
Street Number And Street Name, Including Apartment Or Unit Number If Applicable
City, State And Zip Code
Full Permanent Mailing Address Of Applicant (If Different Than Above)
Telephone Number Of Applicant Date Of Birth

Offense(s)
Applicant: Do you have other pending criminal charge(s) in which a lawyer has been appointed? ☐ Yes ☐ No
Name Of Lawyer
Full Social Security No. Of Applicant ☐ Has No Social Security No.

☐ Defendant ☐ Parent/Guardian/Trustee ☐

MONTHLY INCOME (money you make)

Employment - Applicant \$
Name And Address Of Applicant's Employer (If not employed, state reason; If self-employed, state trade)
Other Income (Welfare, Food Stamps, S/S, Pensions, etc.) \$
Employment - Spouse \$
Name And Address Of Spouse's Employer

MONTHLY EXPENSES (money you pay out)

Number Of Dependents
Shelter ☐ Buying ☐ Renting \$
Food (including Food Stamps) \$
Utilities (power, water, heating, phone, cable, etc.) \$
Health Care \$
Installment Payments ☐ Vehicle ☐ Other \$
Car Expenses (gas, insurance, etc.) \$
Support Payments \$
Other: (specify) \$

Total Monthly Income \$

DESCRIPTION OF ASSETS AND LIABILITIES

Cash On Hand And In Bank Accounts (List Name Of Bank & Account No.) \$
Money Owed To Or Held For Applicant \$
Motor Vehicles (List Make, Model, Year) (Fair Market Value) (Balance Due)
Real Estate (Fair Market Value) (Balance Due)
Personal Property (Fair Market Value) (Balance Due)
Other Debts \$
Last Income Tax Filed 20____ ☐ Refund ☐ Owe \$
Other \$
Total Assets And Liabilities \$

Bond Type Amount \$ By Whom Posted

NOTE: Read the notice on the reverse side before completing this form.

AOC-CR-226, Rev. 10/13
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DEVELOP A COMPANION BENCH CARD

- IDS is creating an informational bench card to provide a standard set of factors for judges across the state to review as they make an indigency determination
- The factors do not presume eligibility for any defendants, but would provide a tool for judges to uniformly evaluate indigency
- Selected by research staff following a review of current North Carolina practices, other states' statutes and procedures, and the best practices of the Brennan Center for Justice



DEVELOP A COMPANION BENCH CARD

Factors for Review During Indigency Determinations	
1	Income and expenses
2	Assets and debts
3	Case factors and costs associated with securing an attorney
4	Current federal poverty guidelines and county-based living wage info.
5	Receipt of need-based government benefits
6	Has, or recently had, appointed counsel in another case
7	Resides in a corrections facility or a mental health facility
8	Unable to post bail or bond



PROVIDE TRAINING AND TECHNICAL ASSISTANCE TO COURT PERSONNEL

- The NCAOC will work with the Clerk Resource Committee to explore strategies for increasing the entry of information related to denial of counsel and attorney type into Criminal Case Indexing System, Clerk Component (CCIS-CC).
- Other impacted groups of court personnel will also require training and additional information to better understand the new tools and changes in process.
- Neither tool is expected to increase the average length of time that an indigency determination takes





THANK YOU

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